No. 97-372

In The

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,
Petitioner,

v.

UNITED STATES SHOE CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether application of the *ad valorem* Harbor Maintenance Tax (26 U.S.C. § 4461(a)) to goods loaded at ports of the United States for export shipment violates the Export Clause of the Constitution.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 LISTING

On May 23, 1995, the assets of the Footwear Division of Respondent United States Shoe Corporation were acquired by Nine West Group Inc. Nine West Group Inc. is a publicly traded company. There are no parent companies and no nonwholly owned subsidiaries other than as set forth herein.

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BRIEF FOR THE RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions set forth in the Government's brief, the following statutory provisions are also relevant and reproduced in the appendix to this brief: Harbor Maintenance Tax, 26 U.S.C. § 4462(f)(1)-(2); Harbor Maintenance Trust

Fund, 26 U.S.C. § 9505; Management of Trust Funds, 26 U.S.C. § 9602(b)(1); Harbor Development and Navigation Improvement Act of 1986, 33 U.S.C. § 2236(a)(1)-(4).

STATEMENT

1. This action challenges the Harbor Maintenance Tax ("HMT") as applied under § 4461 of the Internal Revenue Code (26 U.S.C. § 4461) to merchandise exported from the United States. The Export Clause of the U.S. Constitution provides that "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5. The United States Court of International Trade ("CIT") held the HMT unconstitutional as applied to exports, and the United States Court of Appeals for the Federal Circuit affirmed, relying in substantial part on this Court's recent decision in *United States v. International Business Machines Corp.*, 116 S. Ct. 1793 (1996) (hereinafter "*IBM*").

The HMT is described in the statute as a "tax on any port use" and is a part of the Internal Revenue Code. 26 U.S.C. § 4461(a). The term "port use" is defined as the loading or unloading of commercial cargo on or from a commercial vessel at a port. 26 U.S.C. § 4462(a)(1). As applied to exports, the HMT is (1) paid by the exporter (26 U.S.C. § 4461(c)(1)(B)); (2) assessed as a percentage (currently 0.125%) of the value of the exported merchandise (26 U.S.C. § 4461(b)); and (3) imposed at the time the goods are loaded on the vessel for export (26 U.S.C. § 4461(c)(2)).

HMT payments are received by the United States Customs Service and deposited into the United States Treasury. Pet. App. 70a, citing United States General Accounting Office, *U.S. Customs Service: Limitations in Collecting Harbor Maintenance Fees*, GAO/GGD-92-25, at 5 (Dec. 1991); J.A. 82-83. An equivalent amount is then appropriated from the Treasury to the Harbor Maintenance Trust Fund ("Trust Fund"), from which expenditures may be made if further authorized by Congress. 26 U.S.C. § 9505.

The Trust Fund has run a yearly surplus since its inception. Pet. App. 51a, citing *Second Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund For Fiscal Year 1993* at 5 (1994); J.A. 68-69.[1] The cumulative surplus was $865 million as of fiscal year 1996 and is projected to reach nearly $3 billion as of fiscal year 2001. *Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Years 1995 and 1996* at 7 (1997) ("*1995-96 Annual Report*"). *See also* Pet. App. 88a-89a (referring to surplus as of 1994).

HMT revenues are included in federal budget calculations. As the CIT observed:

> The practice of listing trust fund revenues on budget permits them to be included in calculations of the federal budget deficit. Thus, any monies contributed by such funds to the budget decreases the Treasury's need to borrow in order to finance the federal deficit.

Pet. App. 51a, citing H.R. Rep. No. 251 pt. III, 99th Cong., 1st Sess. 19 (1985). The Trust Fund surplus is invested in interest-bearing obligations of the United States. 26 U.S.C. § 9602(b)(1).

2. Respondent United States Shoe Corporation filed suit in the CIT for a refund of HMT paid in connection with its exports for the quarter ending June 30, 1994. A three-judge panel unanimously held that the HMT, as applied to exports, is unconstitutional under the Export Clause. A five-judge

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[1] The President is required to transmit annually to Congress a report on the status of the Trust Fund. Pub. L. No. 102-580, § 330, 106 Stat. 4797, 4851 (1992).

panel of the Court of Appeals for the Federal Circuit affirmed the CIT's judgment, with one judge dissenting.[2]

In holding that the HMT is an unconstitutional tax on exports, the CIT stated (Pet. App. 66a-67a):

> Congress imposed the Tax directly upon exports well along the stream of exportation. The Tax is assessed at the time of loading the cargo. 26 U.S.C. § 4461(c)(2). As a tax imposed upon delivery of cargo to a carrier violates the Export Clause, *see A.G. Spalding* [*v. Edwards*, 262 U.S. 66, 68-70 (1923)], a tax imposed on the further step of loading such cargo onto the vessel also falls within the prohibition of the Clause.
>
> The Tax is assessed *ad valorem* directly upon the value of the cargo itself, not upon any services rendered for the cargo, or upon any instruments of commerce that accompany the goods. Further, an *ad valorem* tax is levied in direct proportion to an article's value. Congress could not have imposed the Tax any closer to exportation, or more immediate to the articles exported.

The CIT found that the HMT is not a user fee under a three-prong test derived from *Massachusetts v. United States*, 435 U.S. 444 (1978), and *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).[3] Under that test, in order to constitute a user fee rather than a tax, (1) the charge must not discriminate against the constitutionally-protected interest; (2) the implementing authority must base the charge upon a fair approximation of the use of the facility at issue; and (3) the charge must not be excessive in relation to the cost to the government of the benefits conferred. *Massachusetts*, 435 U.S. at 464-70. The CIT found that the HMT fails both the second and third prongs. Pet. App. 60a.

The CIT concluded that the HMT is not based upon a fair approximation of use because: (1) exporters and importers of low-value bulk cargo use port facilities to a much greater extent than exporters and importers of high-value non-bulk cargo, yet the former bear lower HMT costs than the latter; (2) most large ports paying the majority of HMT costs receive no more than 30% back in maintenance expenditures; and (3) although only certain commercial users must pay the tax, they are not the sole users of the ports nor the only beneficiaries of maintenance and development projects.[4] Pet. App. 60a.

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[2] Both courts below unanimously held that the CIT had jurisdiction under 28 U.S.C. § 1581(i). The Government acknowledges that the CIT properly exercised jurisdiction (U.S. Br. 7-8 n.3), but its explanation of the CIT's jurisdiction is inaccurate. The court of appeals confirmed that the CIT had subject matter jurisdiction under § 1581(i), the court's residual jurisdiction provision, rather than under 28 U.S.C. § 1581(a), which applies to actions challenging the Customs Service's denial of a protest, as the statutory prerequisite for a valid protest — a "decision" of the Customs Service — does not exist in the HMT context. Thus, the court found U.S. Shoe's filing of a protective protest to be irrelevant.

[3] *Massachusetts* involved a challenge to an assessment as violative of the judicially-implied intergovernmental tax immunity doctrine, while *Evansville* involved a challenge to a charge under the Commerce Clause. This Court has not previously addressed whether the *Massachusetts/Evansville* standard is relevant to the Export Clause, and the court of appeals acknowledged that a stricter standard might well be appropriate. *See* Pet. App. 19a-20a.

[4] Many "port users" are exempt from the HMT. The statute contains exemptions for intraport movements of cargo, port use by the U.S. Government, humanitarian and development assistance cargo, shipments of fish or other aquatic animals not previously landed on shore, bunker fuel, ship's stores, and any cargo shipped between the continental United States and Alaska, Hawaii, or any U.S. possession (with the exception of crude oil transported from Alaska). 26 U.S.C. § 4462.

With respect to the third prong under *Massachusetts*, the CIT recognized not only that the HMT is "on budget," thereby permitting HMT revenues to be included in calculations of the federal deficit (Pet. App. 51a), but also found that the HMT is excessive in relation to the cost to the government, as it is used to fund projects yet to be commenced or even envisioned (rather than to repay the government for services rendered), and has produced a continually expanding surplus that is used to offset general federal deficits. Pet. App. 60a.

3. Relying in substantial part on this Court's recent decision in *IBM*, the court of appeals affirmed the CIT's holding that the HMT is unconstitutional as a tax or duty on exported articles. The court noted (Pet. App. 24a):

> Here, the HMT is imposed on an *ad valorem* basis at the time the exported goods are loaded on the vessel, rather than at some prior point in time when the goods are not yet bound for export. The exporter, rather than the manufacturer, pays the tax. In the absence of the export act of loading the goods, and in the absence of the exporter's documents required for that act, the HMT would not be owed and no amount could be determined because the HMT is incurred at the time of loading, 26 U.S.C. § 4461(c)(2)(A), and is based on the value of the goods as determined by the standard commercial export documentation, 26 U.S.C. § 4462(a)(5)(A). *See also* 19 C.F.R. § 24.24(e)(2)(i).

The court of appeals also upheld the CIT's determination that the HMT is not a user fee under *Massachusetts* because it is not based on a fair approximation of use. Pet. App. 23a. The court of appeals distinguished cases relied on by the Government in which *ad valorem* fees were upheld, *United States v. Sperry Corp.*, 493 U.S. 52 (1989), and *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). The

court noted that exporters are not assured harbor maintenance at the harbor where their goods are loaded, and that the HMT, as imposed on exports, is paid by indirect users of the harbors — exporters, rather than the direct users — the ship owners. Pet. App. 19a-21a. The court further observed that because *Sperry* involved a suit under the Just Compensation Clause, the standard for upholding the assessment in that case was less restrictive than the standard that applies under the Commerce Clause. The court of appeals noted that "per *IBM*, the Export Clause is still more restrictive." Pet. App. 19a-20a.

Finally, the court of appeals rejected the Government's contention that "fair approximation of use" refers to "the value of the benefits received" as opposed to "the costs of the benefits received." The court noted: (1) the *Massachusetts* case itself suggests that the value of the benefits is not the appropriate measure; (2) higher value merchandise does not always correlate to a higher profit margin; (3) exporters are forced to pay for harbor maintenance nationwide even though they receive no benefits from harbors other than the one they use; and (4) the HMT does not pay for services such as police, fire or rescue units, which provide benefits to exporters by keeping harbors safe whether the exporters use those services or not. Pet. App. 21a-22a. Accordingly, the court of appeals rejected the Government's contention that the HMT as applied to exports is a valid user fee and outside the scope of the Export Clause.[5]

SUMMARY OF ARGUMENT

The Export Clause is broad and unqualified: "No Tax or duty shall be laid on Articles exported from any State." The Clause was one of the important compromises that made possible the adoption of the Constitution, and the Court has

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[5] Judge Mayer, alone of the eight lower court judges to consider the HMT, dissented.

consistently interpreted the Clause in accordance with its expansive language. As the Court recently reaffirmed: "The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.'" *United States v. International Business Machines Corp.*, 116 S. Ct. 1793, 1797 (1996), quoting *Fairbank v. United States*, 181 U.S. 283, 290 (1901).

The Government contends that there is a broad user fee exception to the Export Clause, but no Export Clause precedents support that view. The principal precedents on which the Government relies, *Massachusetts v. United States*, 435 U.S. 444 (1978), and *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), are inapplicable in the Export Clause context. *Evansville* considered whether a nondiscriminatory State levy was consistent with the Commerce Clause, while *Massachusetts* considered whether a nondiscriminatory charge violated an implied State immunity from federal taxation. As confirmed in *IBM*, the cases construing such implied constraints have little if any relevance in applying the express textual prohibition of the Export Clause. 116 S. Ct. at 1798-99.

Accordingly, any exception to the Export Clause for a charge asserted to be a "user fee" rather than a "tax or duty" should be narrowly drawn, limited to a charge that very closely relates to use of government services and that is no greater than necessary to compensate the government for the tendered services. As the lower courts correctly found, the HMT utterly fails to meet even the Government's far broader proposal for a user fee exception, and under a standard more consistent with Export Clause precedents the HMT is manifestly an improper "tax or duty" on exports.

Most significantly, the HMT is assessed *ad valorem*, in direct proportion to the value of export cargo. The Court has consistently recognized that an *ad valorem* tax on exports is precisely what the Framers intended to preclude by the Export Clause. *See e.g.*, *Fairbank*, 181 U.S. at 291; *A.G. Spalding*

& Bros. v. Edwards, 262 U.S. 66 (1923). While the Government characterizes the HMT as a fee for "port use," the HMT applies without regard to the size of the vessel, the manner or extent of use of harbor maintenance services, or any attributes of the port. Functionally, the assessment is imposed directly on export commerce and is indistinguishable from a traditional tax or customs duty.

The fact that Congress created a trust fund for HMT revenues is of little or no practical significance. First, harbor maintenance and development are traditional governmental functions, long funded from general tax revenues and serving broad national interests. The HMT simply replaced one form of "tax" with another in funding these governmental functions. Further, HMT receipts are "on budget" and thereby offset congressional deficit calculations in determining discretionary spending available for other governmental programs. The ever-growing Trust Fund surplus, which stood at $865 million as of fiscal year 1996 and is projected to grow to nearly $3 billion as of fiscal year 2001, operates to free up funds elsewhere in the budget, and in addition is recycled back into the general Treasury by investments in government obligations.

The Government's characterization of the HMT as a "user fee" rather than a "tax or duty" was thus correctly rejected by the lower courts, even under the lenient *Evansville/Massachusetts* standard urged by the Government. The HMT is not closely, or even remotely, related to an exporter's use of federal harbor maintenance services, and the amounts collected substantially exceed the government's harbor maintenance costs on a nationwide basis. The HMT, in both form and substance, is a "tax or duty" on exports and thus within the express prohibition of the Export Clause.

ARGUMENT

I. THE EXPORT CLAUSE BROADLY PROHIBITS FEDERAL REVENUE MEASURES APPLIED TO EXPORT COMMERCE. ANY USER FEE EXCEPTION SHOULD BE NARROWLY LIMITED.

A. The Export Clause's Prohibition Is Expansive.

The Export Clause states: "No Tax or Duty shall be laid on Articles exported from any State." Art. I, § 9, cl. 5. Succinct and straightforward, the Clause was nevertheless among the most actively debated at the 1787 Constitutional Convention. Some delegates declared emphatically that a broad export exemption was necessary to gain their support for a federal taxation power,[6] or for the Constitution itself.[7] Others opposed an unqualified ban, arguing that exports should not be "exempt from all contributions for the public service."[8] The opponents offered a variety of proposals to limit the exemption: one to allow export duties upon two-thirds vote of Congress, another to apply the exemption only to certain products, another to limit the ban to a fixed period of time, and another to prohibit export taxes only "for the purpose of revenue."[9] But a majority rejected these

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[6] Madison's *Notes of Debates in the Federal Convention*, reproduced in 2 Max Farrand, *The Records of the Federal Convention of 1787* 305-06 (rev. ed. 1966) ("*Records*") (statement of George Mason of Virginia).

[7] *Id.* at 95 (statement of General Pinckney of South Carolina), 360 (statement of Hugh Williamson of North Carolina), 360 (statement of Pierce Butler of South Carolina: "strenuously opposed to a power over exports; as unjust and alarming to the staple States").

[8] *Id.* at 223 (statement of Gouverneur Morris of New York).

[9] *Id.* at 359-63.

proposals, and the Convention instead removed exports entirely from the federal government's powers of taxation.[10]

This Court has repeatedly recognized the unqualified nature of the Export Clause and the importance that the Framers attached to it. In the seminal Export Clause case *Fairbank v. United States*, 181 U.S. 283 (1901), the Court stated:

> [T]he purpose of the restriction is that *exportation — all exportation — shall be free from national burden*. This intent, although obvious from the language of the clause itself, is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word "duty" the words "for the purpose of revenue," but the motion was voted down. So it is clear that the framers of the Constitution intended, not merely that exports should not be made a source of revenue to the national government, but that *the national government should put nothing in the way of burden upon such exports*.

181 U.S. at 292-93 (emphasis added). The Court thus held in *Fairbank* that the Export Clause should be given a broad rather than narrow construction:

> [I]f the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power

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[10] *See* 2 *Records* at 220 ("the hands of the Legislature were absolutely tied. . . — exports could not be taxed") (statement of Rufus King of Massachusetts); 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1011, at 470 (1833) (by virtue of the Export Clause, "[t]he power is, therefore, wholly taken away to intermeddle with the subject of exports"). *See also IBM*, 116 S. Ct. at 1803 ("there is substantial evidence from the Debates that proponents of the [Export] Clause fully intended the breadth of scope that is evident in the language").

> of Congress *that prohibition or limitation should be enforced in its spirit and to its entirety*. . . . The true spirit of constitutional interpretation in both directions [grants of powers, and limitations on powers] is to give *full, liberal construction* of the language, aiming ever to show fidelity to the spirit and purpose.

181 U.S. at 289 (emphasis added).

Much more recently, in *IBM*, a case which the Government's brief remarkably fails even to mention, the Court affirmed the continuing vitality of the Export Clause and the fact that it "strictly prohibits any tax or duty, discriminatory or not, that falls on exports during the course of exportation." 116 S. Ct. at 1797. The Court quoted from *Fairbank* as follows:

> The requirement of the Constitution is that exports should be free from any governmental burden. The language is "no tax or duty." Whether such provision is or is not wise is a question of policy with which the courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress . . . .

IBM, 116 S. Ct. at 1797, quoting *Fairbank*, 181 U.S. at 290.

Consistent with this recognition of the importance and breadth of the Export Clause, the Court has repeatedly rejected efforts to dilute its protection of export commerce. In *Fairbank* itself, the Court observed that "free exportation . . . was one of the purposes of the Constitution" (181 U.S. at 291) and thus struck down a stamp tax imposed on foreign bills of lading. Such a tax was in substance and effect a tax on the export articles and, therefore, impermissible. Likewise, in *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19 (1915), the Court invalidated a tax on marine insurance policies as applied to export commerce, even

though the tax applied indiscriminately to domestic and import commerce as well.[11] And in *United States v. Hvoslef*, 237 U.S. 1, 13 (1915), the Court ruled that the Export Clause "is designed to give immunity from taxation to property that is in the actual course of exportation" and thus struck down a federal tax on charter parties to the extent it applied to charters for export shipments.[12]

Similarly, in *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923), the Court unanimously ruled that "[a]rticles in course of [export] transportation cannot be taxed" (*id.* at 69), and thus invalidated a federal sales tax on sporting equipment when applied to sales made as a part of the export process. Application of the tax to export sales would deny the "liberal protection" to which exports were constitutionally entitled. *Id.* at 70.

To be sure, the Court has invoked the Export Clause only where a federal revenue measure applies to goods in the process of exportation or to the export process itself. Thus, a manufacturing tax is not prohibited even though some of the goods being manufactured are intended ultimately for export. Because the activity subject to the tax (manufacturing) precedes the export process, the Export Clause is not

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[11] *Thames & Mersey* was reaffirmed in *IBM*.

[12] The *Fairbank*/*Hvoslef*/*Thames & Mersey* line of cases was aptly summarized in *Willcuts* v. *Bunn*, 282 U.S. 216, 228 (1931):

> [W]ith respect to federal taxation of articles exported from any State, the constitutional inhibition gives immunity to the process of exportation and to the transactions and documents embraced in that process. Only on that construction can the constitutional safeguard be maintained.

(Citations omitted).

implicated.[13] Similarly, because an income tax applies to net income based on all of a taxpayer's revenues and costs, and is calculated well after the export process is finished, the Export Clause does not apply even though the taxpayer engages in export commerce.[14] However, as the Court stated most recently in *IBM*, "the Export Clause strictly prohibits any tax or duty, discriminatory or not, that falls on exports during the course of exportation." 116 S. Ct. at 1797. The Clause thus "disallows *any* attempt to raise federal revenue from exports." *Id.* at 1802 (emphasis added). The HMT, even more directly than the tax at issue in *IBM*, is a tax on exports and the export process. There, as here,

> [t]he Government's policy argument [for extracting revenues from exports] cannot be squared with the broad language of the Clause. The better reading, that adopted by our earlier cases, is that the Framers sought to alleviate their concerns by *completely* denying to Congress the power to tax exports *at all*.

Id. at 1803 (emphasis added).

B. There Is No Support for a User Fee Exception Which Would Allow Imposition of an *Ad Valorem* Tax on Exports.

The Government's brief suggests that the Court has adopted a user fee exception to the Export Clause under *Massachusetts v. United States*, 435 U.S. 444 (1978), and *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), and has routinely allowed

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[13] *Cornell v. Coyne*, 192 U.S. 418 (1904); *Turpin v. Burgess*, 117 U.S. 504 (1886).

[14] *William E. Peck & Co. v. Lowe*, 247 U.S. 165 (1918). *See also Barclay & Co. v. Edwards*, 267 U.S. 442 (1924); *National Paper & Type Co. v. Bowers*, 266 U.S. 373 (1924).

governmental levies on exports under such an exception. *See, e.g.*, U.S. Br. 13-14, 19 ("The Export Clause does not proscribe 'revenue measures that operate only to compensate a government for benefits supplied,'" quoting *Massachusetts v. United States*). But, not surprisingly in light of the "broad language of the Clause" (*IBM*, 116 S. Ct. at 1803) and the fact that the Framers "fully intended the breadth of scope that is evident in the language" (*id.* at 1803), the reality is very different. There is no Export Clause precedent for the approach urged by the Government; to the contrary, precedents require that any exception to the Export Clause for a charge asserted to be a "user fee" rather than a "tax or duty" be very narrowly drawn.

1. Only once has the Court concluded that a charge on exports fell outside the Export Clause, and it did so in narrow circumstances and solely for the purpose of ensuring that the exports would be exempt from taxation. The Act of July 20, 1868, 15 Stat. 157, *repealed* Aug. 8, 1882, 22 Stat. 372, imposed an excise tax on manufactured tobacco but allowed an exemption for tobacco that was to be exported. To prevent abuse of this export exemption, the law required that a stamp be affixed at the factory to tobacco intended for export, and a small charge was imposed for the stamp.[15] In *Pace v. Burgess*, 92 U.S. 372 (1876), the Court concluded that this charge, intended to prevent fraud and to ensure the availability of a tax exemption for legitimate exports, was not prohibited by the Export Clause:

> The stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer

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[15] The charge was initially 25 cents per package, later reduced to 10 cents. The manufacturer could package export shipments in as large a package as it wished, and thus the stamp fee "bore no proportion whatever to the quantity or value of the package on which it was affixed." *Pace v. Burgess*, 92 U.S. at 375.

desired to export, *and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected*. It was a means devised to prevent fraud, and secure the faithful carrying out of the declared intent with regard to the tobacco so marked. . . .

[The fee for the export stamp reflected] the expense of those arrangements which were *necessary in order to give to the exporter the benefit of exemption from taxation*, and at the same time to secure the necessary precautions against the perpetration of fraud. We know how next to impossible it is to prevent fraudulent practices wherever the internal revenue is concerned; and the pretext of intending to export such an article as manufactured tobacco would open the widest door to such practices, if the greatest strictness and precaution were not observed. The proper fees accruing in the due administration of the laws and regulations necessary to be observed to protect the government from imposition and fraud likely to be committed under pretence of exportation are in no sense a duty on exportation. They are simply the compensation given for services properly rendered.

Id. at 375 (emphasis added).[16]

Thus, the Court held that the stamp requirement for exports was not a tax or duty. Reasoning that "we must regard things rather than names," the Court found that the stamp was used "for quite a different purpose from that of imposing a tax or duty: indeed, *it is used for the very contrary*

[16] The Government selectively quotes from this passage to convey the impression that there is a broad Export Clause exception for "proper fees." U.S. Br. 28-29. Significantly, however, the Government omits critical language which makes clear that the fees being addressed had the very limited purpose discussed above and were "in no sense a duty on exportation." 92 U.S. at 375. The HMT is not remotely similar in nature or effect.

purpose, — that of securing exemption from a tax or duty." *Id.* at 376 (emphasis added).[17]

Thus, the only direct precedent for an exception to the Export Clause is for a limited government fee, not related to the value of the export and designed solely to cover the government's administrative expenses in ensuring that exports *would be exempt* from otherwise applicable taxes. Obviously, the HMT does not fall within the scope of such an exception.[18]

[17] When the same stamp fee was again challenged a few years later, the Court reiterated this holding without further comment but added an alternative ground — that the fee was applied at the factory before the commencement of the export process. *Turpin v. Burgess*, 117 U.S. 504 (1886).

[18] While never addressed expressly by this Court, some lower courts have suggested that there is an additional exception to the Export Clause: for regulatory programs adopted under the Commerce Clause that have only a minor and incidental revenue impact for exporters. *E.g.*, *Moon v. Freeman*, 379 F.2d 382 (9th Cir. 1967) (a $168 monetary imposition arising from farmer's noncompliance with regulatory program under the Agricultural Adjustment Act did not violate the Export Clause); *but see* Note, *Constitutionality of Export Controls*, 76 *Yale L.J.* 200 (1966) (questioning the constitutionality of such measures). Indeed, there is a hint in the Government's brief (p. 14 n.4) that perhaps the HMT could be upheld on this ground. However, the court of appeals correctly rejected this claim in light of the obvious revenue-raising objectives of the HMT and the lack of any regulatory aspect of the tax. Pet. App. 25a-29a. After all, "[t]he text of the Export Clause . . . expressly prohibits Congress from laying any tax or duty on exports," and general Commerce Clause jurisprudence cannot override that express prohibition. *IBM*, 116 S. Ct. at 1799. *See also North American Co. v. SEC*, 327 U.S. 686, 704-05 (1946) (congressional power under the Commerce Clause "is limited by express provisions in other parts of the Constitution such as § 9 of Article I"); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, *other than are prescribed in the constitution*") (emphasis added).

2. Lacking any favorable Export Clause precedents, the Government relies on decisions from other areas of law and urges adoption of a standard from *Evansville* and *Massachusetts* to define a user fee exception for the Export Clause. Both lower courts agreed that the HMT failed to meet even the *Evansville/Massachusetts* standard, and the court of appeals recognized that the Export Clause might well require a narrower standard. Pet. App. 19a-20a. Indeed, it is clear that the doctrinal analysis that underlies *Evansville* and *Massachusetts* is wholly inapplicable in the Export Clause context.

Evansville involved a New Hampshire levy for airport maintenance that the State applied to both intrastate and interstate commerce. The Court rejected the taxpayer's claim that the State tax was an impermissible restraint on interstate commerce under the Commerce Clause. Even though *Evansville* (decided in 1972) predated *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977),[19] the Court by then had already moved well towards the view that States could impose nondiscriminatory taxes on interstate commerce, notwithstanding the negative implications of the dormant Commerce Clause.[20] This consideration pervades the analysis in *Evansville*, and precedents construing the implied constraints of the Commerce Clause obviously have little value

[19] *Complete Auto Transit* gave the States enhanced freedom to tax interstate commerce by overruling a series of cases that had held it *per se* unconstitutional for States to impose "privilege of doing business" taxes on multi-state businesses. *See IBM*, 116 S. Ct. at 1798.

[20] *E.g.*, *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938) ("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business.").

in applying the express and unqualified constraints of the Export Clause. This Court so held in *IBM*:

> Our decades-long struggle over the meaning of the non-textual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the textual command of the Export Clause is equally fluid. At one time, the Court may have thought that the dormant Commerce Clause required a strict ban on state taxation of interstate commerce, but the text did not require that view. The text of the Export Clause, on the other hand, expressly prohibits Congress from laying any tax or duty on exports.

116 S. Ct. at 1799 (footnote omitted).[21]

The Government's other principal precedent, *Massachusetts v. United States*, is likewise far afield from the Export Clause. It involved a claim by Massachusetts that a federal registration fee for civil aircraft, as applied to State-owned aircraft, violated an implied State immunity from federal taxes. Drawing on decisions in the "analogous" context of the Commerce Clause (435 U.S. at 454 & 462), the Court upheld the fee. The Court observed that "[t]he purpose of the implied constitutional restriction on the national taxing power is not to give an advantage to the States . . . but rather is solely to protect the States from undue interference with

[21] The Government's heavy reliance on the user fee discussion in *United States v. Sperry Corp.*, 493 U.S. 52, 60-62 (1989) (*see* U.S. Br. 17, 20, 22, 24-27) is even more extreme than its reliance on Commerce Clause cases. *Sperry* dealt with the Just Compensation Clause, and as the court of appeals noted below (Pet. App. 19a-20a), *Sperry* held that, in the respect relevant there, the Commerce Clause imposes constraints on government that are greater than those of the Just Compensation Clause. 493 U.S. at 61 n.7. Given that the Export Clause is more restrictive than the Commerce Clause, it follows that Just Compensation Clause cases have little, if any, relevance here.

their traditional governmental functions." *Id.* at 459. Given that the aircraft registration fee was nondiscriminatory and "fell far short" of compensating the federal government for its assistance to civil aviation (*id.* at 469), the State's objection was rejected. "Where the subject of tax is a natural and traditional source of federal revenue and where it is inconceivable that such a revenue measure could ever operate to preclude traditional state activities, the tax is valid." *Id.* at 459-60.

Massachusetts cited no Export Clause precedents, and by its nature the decision's analysis has scant relevance to that clause. Exports are not "a natural and traditional source of federal revenue" (*Massachusetts*, 435 U.S. at 459-60); to the contrary, the Export Clause requires the opposite conclusion. Moreover, the nondiscrimination factor that was a central element of the analysis in *Massachusetts* (as well as in *Evansville*) is no comfort to the Government under the Export Clause. In *IBM*, *Thames & Mersey*, and *Hvoslef*, the Court has consistently held that discrimination *vel non* is an irrelevant factor under the Export Clause so long as a revenue measure is applied to export commerce.[22]

The Government should not be permitted to accomplish through the back door (*i.e.*, an unduly narrow definition of "tax or duty") what the Court has said it cannot accomplish

[22] In addition to relying on Commerce Clause decisions, the *Massachusetts* Court referenced as analogous the Duty of Tonnage Clause (art. I, § 10, cl. 3), citing *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935). *Clyde Mallory* upheld a $7.50 per vessel fee that the Port of Mobile imposed for harbor policing, on the ground that a reasonable charge for traditional harbor services rendered to a vessel such as pilotage, wharfage, or medical inspection was not a "duty of tonnage" under the Tonnage Clause. Even in the context of this relatively innocuous flat per-vessel fee that was imposed on a harbor-specific basis, the Court observed: "It is unnecessary to consider other types of port charges, as for dredging or other forms of harbor improvement, with respect to which different considerations may apply." 296 U.S. at 267.

through the front door (extending the Court's Commerce Clause jurisprudence to the Export Clause). *Massachusetts* and *Evansville* were simply considering what types of nondiscriminatory levies (whether denominated "tax," "fee," or — as *Massachusetts* used on one occasion — "user tax"; 435 U.S. at 464) were consistent with Commerce Clause and implied governmental immunities jurisprudence. The Export Clause calls for a stricter standard.

3. While relying on Commerce Clause and implied tax immunity cases, the Government's brief shies away from the one constitutional provision that expressly adopts a user fee exception — the Import-Export Clause. Art. I, § 10, cl. 2. That clause prohibits (absent congressional consent) State "Imposts or Duties on Imports or Exports, *except what may be absolutely necessary for executing its inspection Laws* . . . ." (emphasis added). Charges for State inspection services are a form of user fee, "paid for service[s] performed" (*Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 438 (1827)), that were authorized by the Framers so that the States could recover their "incidental duties necessary for the inspection & safe-keeping of their produce."[23]

Twice the Court has observed that this express exception for inspection fees in the Import-Export Clause is strong evidence against implying exceptions for other State imposts or duties. As Chief Justice Marshall observed in *Brown v. Maryland*:

> If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the law-giver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the constitution

[23] 2 *Records* 588 (statement of George Mason).

> as to other instruments. If it be applicable, then *this exception in favour of duties for the support of inspection laws, goes far in proving that the framers of the constitution classed taxes of a similar character with those imposed for the purpose of inspection*, with duties on imports and exports, and *supposed them to be prohibited*.

25 U.S. at 438 (emphasis added). The same observation was made in *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 76 (1946):

> Only one exception is created [in the Import-Export Clause] — "except what may be absolutely necessary for executing its inspection Laws." The fact of a single exception suggests that no other qualification of the absolute prohibition was intended.

Thus, while States have not been wholly precluded from charging vessels for the use of State services,[24] the courts have kept a watchful eye on such State measures.[25]

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[24] *See, e.g., Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851) (local ports may charge for pilotage services).

[25] *See, e.g., James B. Beam Distilling Co. v. Department of Revenue*, 367 S.W.2d 267 (Ky. 1963), *aff'd*, 377 U.S. 341, 343 (1964) (inspection-law exception unavailable where State relied on federal inspectors); *Phipps & Phipps v. Cleveland Refining Co.*, 261 U.S. 449 (1923) (State inspection fees in excess of actual inspection costs struck down as improper tax); *Western Oil & Gas Ass'n v. Cory*, 726 F.2d 1340 (9th Cir. 1984) (California's method for collecting "rent" for vessels passing over state-owned tidelands and submerged lands, based on volume of oil in interstate and foreign commerce passing over leased properties, violated Commerce and Import-Export Clauses), *aff'd per curiam by an equally divided Court*, 471 U.S. 81 (1985).

Of course, because the Import-Export Clause does not prohibit nondiscriminatory State taxes, the States may, through such taxes, receive compensation for the governmental services they supply to exporters as

The Import-Export Clause contains a second express exception: a State may impose *any* duty on imports or exports *provided that Congress consents*. Art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, . . ."). Notably, in the Harbor Development and Navigation Improvement Act of 1986, which was enacted as part of the same legislative package as the HMT, Congress specifically invoked this authority under the Import-Export Clause to consent to a narrowly defined category of State and local fees that could be imposed for harbor maintenance. 33 U.S.C. § 2236(a). The Export Clause contains no comparable authority for Congress to impose federal fees for such purposes.

* * * *

In sum, the Framers intended the Export Clause to be broad and unqualified, exempting export commerce from any federal "tax or duty." The exemption should be broadly construed (*Fairbank*, 181 U.S. at 289) and "disallows *any* attempt to raise federal revenue from exports" (*IBM*, 116 S. Ct. at 1802; emphasis added). If a user fee exception is to be implied at all, it should be narrow and consistent with the constitutional command that exports be immune from taxes and duties (*Pace v. Burgess*). Precedents under the Commerce Clause or analogous areas where there are no express textual prohibitions on taxes and duties should be read with great caution and with a full understanding of the different context in which they were decided. The Government should not be permitted, under the guise of a

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well as to other citizens in common, such as fire and police protection. *E.g., Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 753-54 (1978); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 286-94 (1976). As the Court recently reaffirmed in *IBM*, the Export Clause expressly prohibits the federal government from similar levies.

loose, open-ended user fee exception, to extract tax revenues from export commerce.

II. THE HMT, AN *AD VALOREM* ASSESSMENT ON EXPORTS, IS A "TAX OR DUTY" WITHIN THE PROHIBITION OF THE EXPORT CLAUSE.

In light of the foregoing principles, it is clear that the HMT is an impermissible federal levy on export commerce.

A. The HMT Has the Classic Attributes of a Tax on Exports.

All the basic attributes of the HMT, as imposed on exports, support the lower courts' finding that it is a tax or duty prohibited by the Export Clause. The HMT statute itself, 26 U.S.C. §§ 4461-62, repeatedly refers to the HMT as a "tax," and it is codified in the Internal Revenue Code.[26] The legislative history also frequently refers to the HMT as a "tax."[27] And while "we must regard things rather than names" (*Fairbank*, 181 U.S. at 304, quoting *Pace v. Burgess*, 92 U.S. at 376), the HMT inescapably *operates* as a tax as well.

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[26] All statutory references to the HMT indicate it as a "tax." For example, 26 U.S.C. § 4461 imposes "a *tax* on any port use" and goes on to provide numerous other references to "tax," including "amount of *tax*" and "liability and time of imposition of *tax*." (emphasis added). Chapter 36 of the Internal Revenue Code, where the HMT is codified, is entitled "Certain Other Excise *Taxes*" (emphasis added).

[27] *See e.g.*, S. Rep. No. 126, 99th Cong., 1st Sess. 9 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6647 (describing HMT as a "cargo *tax* on the value of the commercial cargo loaded or unloaded"); H.R. Rep. No. 251(IV), 99th Cong., 1st Sess. 23 (1985) (referring to HMT as an "ad valorem *tax*"); H.R. Conf. Rep. No. 1013, 99th Cong., 2d Sess. 228 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6723, 6740 (describing HMT as an "excise *tax*"). (emphasis added).

Most significant is the *ad valorem* nature of the HMT. The tax is imposed in direct proportion to the value of export cargo as the goods are being loaded for export.[28] This value-based approach immediately distinguishes the HMT from the flat-fee stamp charge upheld in *Pace v. Burgess*, where the Court stressed that the small fee "bore no proportion whatever to the quantity or value of the package" to be exported, and that its purpose was to ensure exported tobacco an exemption from an otherwise applicable per-pound levy. 92 U.S. at 375. Twenty-five years later in *Fairbank*, the Court invalidated even a non-graduated stamp fee on export bills of lading, because it could serve as a precedent for "a graduated [*ad valorem*] system," by which "a burden may be cast upon exports sufficient to check or retard them, and which will *directly conflict with the constitutional provision that no tax or duty shall be laid thereon*." 181 U.S. at 291 (emphasis added). And in *A.G. Spalding v. Edwards*, the Court unanimously struck down a federal *ad valorem* sales tax as applied to exports, with the only issue worth discussion being whether the tax was in fact being applied during the export process. 262 U.S. at 69-70. Thus, the Court has consistently recognized that an *ad valorem* tax on exports is precisely what the Framers intended to preclude by the Export Clause.[29]

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[28] The "value" for the purposes of determining the amount of tax is the cargo's value as determined by standard commercial documentation. 26 U.S.C. § 4462(a)(5)(A).

[29] In arguing for the constitutionality of the tax that was struck down in *IBM*, the dissenters stressed that the tax applied to insurance premiums rather than to the cargo itself and that premiums varied only loosely with the cargo's value; hence, "they are not a predictable proxy for a Congress intent upon taxing export value." 116 S. Ct. at 1812 (Kennedy, J.). In contrast, the HMT clearly does tax export value.

The Government characterizes the HMT as a "fee on the use of the ports of the United States." U.S. Br. 12. Even if that characterization were correct, it does not justify an *ad valorem* charge on exports. Particularly given that the Export Clause is to be given "full, liberal construction" (*Fairbank*, 181 U.S. at 289) so as to ensure "liberal protection" for export commerce (*A.G. Spalding*, 262 U.S. at 70), an *ad valorem* fee for the privilege of exporting from a U.S. port could not possibly have been contemplated by the Framers to be a permissible assessment. But in any event, the HMT defines "port use" (the supposed taxable event) as the loading or unloading of cargo for shipment, and the tax is applied without regard to size of vessel, manner or extent of use of port facilities, or any attributes or condition of the port. 26 U.S.C. § 4462(a)(1); *see* Pet. App. 49a. Functionally, then, the assessment is imposed not on "port use," but rather directly on exports. Indeed, it is not the vessel operator or carrier who is liable for the tax, but rather the exporter. 26 U.S.C. § 4461(c)(1)(B).[30]

Other characteristics of the HMT also demonstrate that it is more closely related to exports than other taxes previously struck down under the Export Clause. The HMT, rather than merely being a tax on an instrument or services associated with exports,[31] is imposed directly on the exported articles. Thus, this is not a case where the tax "affect[s] exportation

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[30] *See also* S. Rep. No. 126 at 9, *reprinted in* 1986 U.S.C.C.A.N. at 6647 (the HMT "is not on the harbor, nor is it on the vessel's operator or owner. The tax is set on the value of the cargo, and is to be paid by the owner of the cargo, or his agent.").

[31] Such as the tax on foreign bills of lading in *Fairbank*, on insurance premiums in *Thames & Mersey* and *IBM*, or on charter contracts in *Hvoslef*.

indirectly or remotely," as the Government incorrectly suggests. U.S. Br. 14 n.4.[32]

The term "tax" as used in the Export Clause should be given its "common, and usually expansive" meaning. *IBM*, 116 S. Ct. at 1802. Elsewhere the Court has defined a "tax" as "an enforced contribution to provide for the support of government." *United States v. La Franca*, 282 U.S. 568, 572 (1931); *see also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622-23 (1981) ("tax" is "a means of distributing the burden of the cost of government"). The HMT is such a measure. Even assuming that HMT revenues were truly committed to harbor maintenance and port development,[33] those are traditional governmental functions that are undertaken to advance the interests of the nation as a whole and not just for the benefit of identifiable shippers.[34] For 200 years harbor maintenance had been funded from general tax revenues. *See* S. Rep. No. 228, 99th Cong., 1st Sess. 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6709 ("Historically, Federal expenditures for development and operations and maintenance of harbors and ports have been financed from general revenues."). The HMT simply

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[32] For this same reason, this case does not raise the concerns addressed in Justice Kennedy's dissent in *IBM*, which concluded that the Framers did not intend the Export Clause to prohibit taxes on services that may have only an *indirect* effect on the export process. *IBM*, 116 S. Ct. at 1809.

[33] They are not. *See infra* pp. 28-31.

[34] As the Government itself states, "investment in U.S. ports will facilitate economic development and make the Nation's water transportation system more efficient." U.S. Br. 19, quoting S. Rep. No. 228 at 5. *See also* U.S. Br. 5 (improved harbors will enhance U.S. economic competitiveness and help reduce the national trade imbalance). Facilitating economic development, improving the balance of trade, and the like are all national objectives of general public benefit.

substituted one "tax" for another. *See* S. Rep. No. 126 at 2, *reprinted in* 1986 U.S.C.C.A.N. at 6640 (describing the HMT as "a new *tax* to cover a portion of Federal spending on harbor maintenance") (emphasis added).

The existence of the Harbor Maintenance Trust Fund does not alter the fact that the HMT is a tax. When HMT funds are deposited by the Customs Service into the U.S. Treasury, those proceeds are "on budget" and thus included as tax receipts to offset Government deficit calculations.[35] An amount equivalent to HMT receipts is automatically appropriated into the Trust Fund (26 U.S.C. § 9505), but this is a non-event for budget purposes. Harbor maintenance expenditures are reflected in the budget process only to the extent Congress chooses to appropriate monies from the Trust Fund using the normal appropriations process.[36] Thus, the annual surplus generated by the HMT operates, under the congressional budget process, to free up discretionary funds for other government programs. Moreover, the Fund's surplus is invested in government obligations (26 U.S.C. § 9602(b)(1)) and thereby returned to the Treasury for general use.[37]

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[35] Pet. App. 51a. Attempts to make the Harbor Maintenance Trust Fund off-budget have been unsuccessful. In 1996, the House passed the Truth in Budgeting Act, which would have taken the Harbor Maintenance Trust Fund (and certain other trust funds) off-budget for purposes, *inter alia*, of calculating the amount of general discretionary spending available under the Budget Enforcement Act of 1990, 2 U.S.C. § 900 *et. seq.* *See* H.R. 842, 104th Cong., 1st Sess., § 2, *reprinted in* H.R. Rep. No. 499, pt. 1, at 1 (1996). However, the measure did not pass the Senate.

[36] Trust Fund expenditures can be made only "as provided by appropriation Acts." 26 U.S.C. § 9505(c).

[37] The fact that interest earned is returned to the Fund (26 U.S.C. § 9602(b)(3)) only serves to further increase the cumulative Trust Fund surplus, which is reinvested in government obligations in a perpetual cycle of contributions to the general Treasury.

Further, the current statutory provision that Trust Fund amounts may be appropriated only for specified purposes[38] does not necessarily mean that those amounts will ever in fact be so used.[39] Future expenditures will require that a bill pass Congress and be signed by the President, such as would be the case if there were no Trust Fund at all. U.S. Government trust fund balances

> are available to finance future benefit payments and other trust fund expenditures — *but only in a bookkeeping sense*. Unlike the assets of private pension plans, they do not consist of real economic assets that can be drawn down in the future to fund benefits. Instead, *they are claims on the Treasury* that, when redeemed, will have to be financed by raising taxes, borrowing from the public, or reducing benefits or other expenditures. *The existence of large trust fund balances, therefore, does not, by itself, make it easier for the Government to pay benefits.*

Executive Office of the President, Office of Management and Budget, *Analytical Perspectives: Budget of the United States*

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[38] 26 U.S.C. § 9505(c).

[39] Even current law allows payments for uses well beyond mere harbor maintenance. For example, Trust Fund revenues are used for St. Lawrence Seaway Development Corporation rent payments which are transferred to the Department of Transportation. *See Third Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1994* at 2 (1995); J.A. 94-95. Additionally, the National Oceanic and Atmospheric Administration is a potential recipient of funds from the Trust Fund, for activities such as the creation of navigation charts and marine weather forecasting. *See 1995-96 Annual Report* at 3; *see also* Pet. App. 51a, citing Office of Management and Budget, Executive Office of the President, *FY 1996: Budget of the U.S. Government, Appendix*, 376, 802 (1995).

Government Fiscal Year 1996 263 (1995) (emphasis added). In short, Congress has a completely free hand to allow the Trust Fund surplus to increase indefinitely or to redirect HMT revenues by expanding or modifying the Trust Fund's scope or, indeed, by abolishing it altogether.[40]

In sum, the fact that there is a trust fund for HMT revenues is of little or no significance,[41] and indeed the designation of any funds in the U.S. Treasury as a "trust fund" is essentially arbitrary. *See Analytical Perspectives: Budget for Fiscal Year 1996*, at 251 ("Whether or not a

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[40] The Federal budget meaning of the term "trust" differs significantly from its private sector usage. In the private sector, the beneficiary of a trust usually owns the trust's assets, which are managed by a trustee who must follow the stipulations of the trust. In contrast, the Federal Government owns the assets of most Federal trust funds, and it can raise or lower future trust funds collections and payments, or change the purposes for which the collections are used, by changing existing laws.

Executive Office of the President, Office of Management and Budget, *Analytical Perspectives: Budget of the United States Government Fiscal Year 1998* 341 (1997); *see also* Allen Schick, *The Federal Budget: Politics, Policy, Process* 105 (1995) ("[T]he federal government can abolish its trust funds, change the rules for determining what is deposited into them or paid out, or transfer them to other uses."); *Haskins Bros. & Co. v. Morgenthau*, 85 F.2d 677, 685 (D.C. Cir.), *cert. denied*, 299 U.S. 588 (1936) ("it cannot be doubted that Congress has the power to change the use and disposition" of a trust fund statutorily dedicated to the Philippine government).

[41] *See also Commonwealth Edison*, 453 U.S. at 621 n.11 (noting that payment of 50% of a state severance tax on coal into a trust fund did not undermine the conclusion that the tax is a general revenue tax as it is merely an allocation of current tax revenues for use by future generations); *Schneider Transport Inc. v. Cattanach*, 657 F.2d 128, 132 (7th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982) (truck registration fees were taxes despite fact that all revenues generated were deposited into segregated fund used for transportation purposes such as highway construction).

particular fund is designated as a trust fund is, in many cases, arbitrary. Congress has not followed a systematic rule."). It does not alter the conclusion that the HMT is exactly what it claims to be — a "tax."[42]

B. The HMT Is Also a Customs-Type "Duty" Within the Prohibition of the Export Clause.

The Export Clause prohibits not only "taxes" but also "duties" as applied to exports. While "duty" is generally a narrower term than "tax" (*see IBM*, 116 S. Ct. at 1802

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[42] Congress was mindful that the HMT might well be a tax and thus barred by the Export Clause: "the legislative history reflects that the drafters of the Act were abundantly aware of the constitutional infirmity of the Act." Pet. App. 84a (Musgrave, J., concurring). *See, e.g.*, H.R. Rep. No. 251(IV) at 23, 30, 41-42 (1985). In large part because of concerns that the HMT on exports might be vulnerable to constitutional challenge, Congress included a severability clause in the Water Resources Development Act of 1986, Pub. L. No. 99-662, § 949, 100 Stat. 4082, 4201 (codified at 33 U.S.C. § 2304). The House Committee on Merchant Marine and Fisheries noted:

> The concern of the Committee and the subject of the [severability clause] amendment was, for example, that the constitutional arguments that had been made against imposing a tax on exports might result in the legislation being declared invalid and it was the desire of the Committee to preserve all other provisions of the Act if that or a similar provision be found invalid.

H.R. Rep. No. 251(IV) at 30.

In a case involving the HMT as imposed on passengers, the CIT reviewed the severability clause and held that the HMT as applied to exports was severable from the remaining portions of the statute. *Carnival Cruise Lines, Inc. v. United States*, 929 F. Supp. 1570 (Ct. Int'l Trade 1996). Accordingly, the Government's assertion that the court of appeals' decision would "effectively abolish the Trust Fund . . . by voiding the Harbor Maintenance Tax in its entirety" (U.S. Br. 18 n.8) is unfounded. In fact, non-export HMT payments, which are unaffected by this action, constitute the bulk of HMT revenues. *1995-96 Annual Report* at 4.

(comparing prohibited "Imposts and Duties" under the Import-Export Clause with prohibited "taxes" under the Export Clause)), there is ample basis to conclude that the HMT is a prohibited "duty" as well as a prohibited "tax."

The term "duty" has generally been understood to mean those taxes which are imposed on imported or exported merchandise — in short, customs duties. For example, in *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 622 (1895), the Court noted:

> Cooley (On Taxation, p. 3) says that the word "duty" ordinarily "means an indirect tax imposed on the importation, exportation or consumption of goods;" having "a broader meaning than custom, which is a duty imposed on imports or exports."

Pollock further observed:

> Mr. Justice Story, in his Commentaries on the Constitution, (¶ 952) expresses the view that it is not unreasonable to presume that the word "duties" was used as equivalent to "customs" or "imposts" by the framers of the Constitution, since in other clauses it was provided that "No tax or duty shall be laid on articles exported from any State," and that "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and he refers to a letter of Mr. Madison to Mr. Cabell, of September 18, 1828, to that effect. 3 Madison's Writings, 636.

Pollock, 158 U.S. at 622. *See also Brown v. Maryland*, 25 U.S. at 437 (defining duty on imports as "a custom or a tax levied on articles brought into a country").[43]

The HMT is indistinguishable from a traditional customs duty, for it is a direct assessment on cargo entering and leaving the country. Furthermore, like most customs duties, it is imposed on an *ad valorem* basis directly against the value of the merchandise being shipped. And, like all such customs duties, the HMT is assessed without limitation as to the amount which may be owed, rather than being subject to a maximum ceiling; the HMT increases with the value of the exported merchandise, just as customs duties typically do with imported merchandise.

Not surprisingly, therefore, the HMT statute provides that "all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] *as if such tax were a customs duty*." 26 U.S.C. § 4462(f)(1) (emphasis added). Congress thus determined that the Customs Service is the appropriate agency to collect, administer and enforce the HMT in view of its "strong presence at ports of entry" and its "experience[] at appraising imported merchandise." S. Rep. No. 228 at 10, *reprinted in* 1986 U.S.C.C.A.N. at 6714.

In further recognition that the HMT is a customs duty, Congress provided that "[f]or purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the [HMT] shall be treated *as if such tax were a customs duty*." 26 U.S.C. § 4462(f)(2) (emphasis added). Accordingly, Congress provided that the Court of International Trade, with its centralized jurisdiction over

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[43] *Black's Law Dictionary* 505 (6th ed. 1990) similarly states: "In its most usual signification this word [duties] is the synonym of imposts or customs; *i.e.* tax on imports...." *Black's* also states that the term "customs" is "usually applied to those taxes which are payable upon goods and merchandise imported or exported." *Id.* at 386, citing *Pollock*, *supra*.

virtually all transactions involving customs duties, should have jurisdiction over actions involving the HMT. *See* S. Rep. No. 228 at 10, *reprinted in* 1986 U.S.C.C.A.N. at 6715.[44]

In sum, the HMT as applied to exports is indistinguishable from a customs duty both in terms of how it is assessed and how it was treated by Congress. Accordingly, the HMT falls within the express language of the Export Clause as a prohibited "duty" on exported articles.[45]

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[44] *Amici* Arctic Cat *et al.* contend that the CIT lacked subject matter jurisdiction over this case under 28 U.S.C. § 1581. That contention is incorrect. Congress expressly provided that "[f]or purposes of determining the jurisdiction of any court of the United States . . ., the tax imposed by this subchapter [*i.e.*, the HMT] shall be treated as if such tax were a customs duty." 26 U.S.C. § 4462(f)(2). The CIT has broad jurisdiction over customs matters, and thus it should be "beyond dispute that Congress intended the [CIT] to have jurisdiction over disputes regarding the HMT." Pet. App. 14a. *See also* S. Rep. No. 228 at 10, *reprinted in* 1986 U.S.C.C.A.N. at 6715 (CIT "is to have primary jurisdiction for actions involving the port user charge provisions.").

In the courts below, the parties agreed that the CIT had jurisdiction under 28 U.S.C. § 1581, but disagreed as to the applicable subsection. Both courts below unanimously held that subsection (i), rather than subsection (a), applies. As the court of appeals explained, the HMT applies to imports as well as exports, and section 1581(i) confers jurisdiction in actions arising out of laws that provide for "administration and enforcement with respect to" specified matters, including "revenue from imports." 28 U.S.C. § 1581(i)(1),(4). Pet. App. 14a. The Government did not seek review of that jurisdictional holding because "[w]hether the jurisdiction of the court rests upon 28 U.S.C. 1581(a) . . . or upon 28 U.S.C. 1581(i) . . . has no relevance to the proper disposition of this case." Pet. 7 n.2; U.S. Br. 7-8 n.3. *See also*, *supra* p. 4 n.2; Resp. C.A. Br. 21-24 (discussing jurisdictional issue).

[45] Labeling the HMT as a "user fee" does not alter its basic character as a customs duty. *See Best Foods, Inc. v. United States*, 218 F. Supp. 576, 580-81, 50 Cust. Ct. 94, 99 ("fee" imposed on imported merchandise to ensure viability of domestic price support program held, "in truth," to be a customs duty), *modified on other grounds*, 51 C.C.P.A. 1 (1963).

C. The Government's Characterization of the HMT as a "User Fee" Was Correctly Rejected by the Lower Courts.

In an attempt to avoid the Export Clause, the Government is relegated to arguing that the Harbor Maintenance Tax is a "user fee" and not a "tax or duty." As just discussed, however, the HMT meets the classic standards of a "tax or duty" as those terms appear in the Export Clause. And, as discussed in Part I above (at 18-21), the principal "user fee" cases cited by the Government are inapposite because they did not involve the Export Clause: *Massachusetts* involved an implied intergovernmental tax immunity; *Evansville*, the Commerce Clause; and *Sperry*, the Just Compensation Clause. The express and categorical prohibition of the Export Clause requires a different and stricter analysis than applied in those cases.

Accordingly, any "user fee" exception to the Export Clause should be narrowly limited to fees that "are in no sense a duty" but instead are "simply the compensation given for services properly rendered." *Pace v. Burgess*, 92 U.S. at 375. This requires that the fees be very closely related to use of a government service (*cf. Massachusetts*, 435 U.S. at 464 ("some fair approximation of use")) and be no greater than absolutely necessary to compensate the government for the tendered service (*cf.* the Import-Export Clause ("except what may be absolutely necessary for executing [the State's] inspection Laws"); *Massachusetts*, 435 U.S. at 469 (the charge may not be "excessive in relation to the cost of the Government benefits supplied")). As the lower courts correctly held, the HMT fails even to meet the *Massachusetts/Evansville* standard, and *a fortiori* it fails to meet the more restrictive standard that should apply under the Export Clause.

1. The HMT Is Not Closely Related to the Exporter's Usage of Harbor Maintenance Services.

The HMT bears no close relationship to an exporter's use of federal harbor maintenance services. Indeed, the lower courts properly concluded that the HMT fails to meet even the *Massachusetts* standard of "fair approximation of use."

a. The very nature of the HMT — an *ad valorem* tax assessed upon merchandise loaded for export — virtually compels this conclusion. The HMT is computed against the value of the cargo, irrespective of its weight, size, and amount or type of port use. No distinction is made between natural deep-water ports that require little or no maintenance, and those requiring extensive development and/or maintenance. Nor is any distinction made based on the type of cargo or vessel being employed. Exporters of low-value, high-bulk cargo, who require deep draft vessels and thus a greater degree of dredging, benefit from maintenance services to a much greater extent than exporters of high-value, low-bulk cargo, who need only a shallow draft harbor. Yet, the former pay less HMT than the latter.

The Army Corps of Engineers has acknowledged that there is "no relationship between the amount of money spent on a port's maintenance, and the amount of revenue collected from cargo moving in or out of that particular port." Army Corps of Engineers, *Briefing Book and Fact Sheets on the Harbor Maintenance Fee and Trust Fund* at 1 (Feb. 14, 1990); J.A. 77. Indeed, most large ports accounting for the majority of HMT revenues receive no more than 30% back in maintenance services. Pet. App. 60a, citing Army Corps of Engineers, *Estimated Receipts of Harbor Maintenance Fee from Cargo Transiting Major Ports* (1992) (draft document); J.A. 85-86. To cite one example, of an estimated $78,711,000 in 1992 taxes on exports and imports collected at

the Port of Los Angeles, only $162,000 was returned in federal port services. J.A. at 85.

The Government contends that by imposing the HMT on an *ad valorem* basis, "Congress rationally concluded that shippers of higher value cargo would receive greater benefits (*e.g.*, greater profits)" from port maintenance. U.S. Br. 28. But this simply demonstrates that the HMT is not tied to use, but rather, like a typical tax, is based on a taxpayer's presumed ability to pay. Moreover, the court of appeals properly observed that "the government has failed to present any facts that would suggest that, even on average," higher value merchandise correlates with higher profits. Pet. App. 22a. One exporter may take a $100,000 loss on a cargo of precious gems valued at $10 million, while another may make a $100,000 profit on cargo of cement valued at $1 million. Thus, the Government's own argument reinforces the conclusion that the HMT does not approximate use of harbor maintenance services, but is instead a traditional *ad valorem* tax.[46]

Sperry, on which the Government relies heavily, does not require a contrary conclusion. There, the Court upheld an *ad valorem* deduction from awards by the Iran-U.S. Claims Tribunal as a means to reimburse the Government for claim-arbitration expenses. While it could be said that the award recipient in *Sperry* benefitted generally in proportion to the size of the award, thus justifying an *ad valorem* assessment, the same cannot be said in the HMT context, where higher value cargo simply does not equate with a higher return (*i.e.*,

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[46] Accordingly, the Federal Circuit correctly distinguished *Alamo Rent-A-Car v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990), relied on by the Government in the proceedings below and in its brief here (pp. 18, 25). Unlike in *Alamo*, where an airport access fee was found to represent, "on average," a rental car company's use of an airport facility, there has been no finding that the HMT represents, "on average," an exporter's port usage. Pet. App. 21a.

profit) to the exporter. In any event, as the court of appeals properly observed, *Sperry* is also inapplicable for another reason — it concerned the Just Compensation Clause, not the Export Clause. Pet. App. 19a-20a; *see also supra* p. 19 n.21.

Thus, contrary to the Government's assertion (U.S. Br. 26), the court of appeals heeded this Court's admonition that the validity of a charge is to be "judged by its results, not its formula." The court of appeals examined the results that follow from the *ad valorem* application of the tax and properly concluded that the HMT is not based upon a fair approximation of use. Moreover, the court of appeals did not insist on a "precise calibration" to use. U.S. Br. 22, 24. The court of appeals, after analyzing the application of the HMT, merely recognized the lack of any reasonable correlation between the amount of HMT and the amount of use of governmental services. Indeed, the court of appeals actually gave the Government the benefit of any doubt and concluded that even if the *Massachusetts* "fair approximation of use" test refers, as the Government contended, to the *value* of the benefits received rather than the *costs* of the benefits received, the HMT still would not be a fair approximation. Pet. App. 21a-22a.

b. As stated by the court of appeals, another defect of the HMT is that exporters are required to pay for maintenance of ports all over the country, irrespective of any use made outside of the exporters' particular locality. Pet. App. 22a. The Government maintains that a similar rationale was rejected in *Massachusetts* (U.S. Br. 29), but the services there at issue were fundamentally different. *Massachusetts* involved civil aviation, the "integrated national airsystem," and "a wide array of air navigational facilities and services that benefit all aircraft flying in the Nation's navigable airspace." 435 U.S. 446-47. Harbor services, by their very nature, are more location-specific; an exporter who ships oranges from Miami, Florida, gains no benefit from dredging operations in Portland, Oregon, through which he never ships. The broad,

nationwide scope of the HMT funding program shows it to be a revenue-raising measure, not a user fee.[47]

Further, the tax regime in *Massachusetts* "fairly reflect[ed] the benefits received" by aircraft operators since the levies were either "geared directly to use" or "g[a]ve weight to factors affecting the level of use" (weight and speed of the aircraft, etc.). *Id.* at 468-69. The HMT makes no effort to apportion its burden to the level of use of government services, local or nationwide.[48]

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[47] By comparison, expenditures from the funds generated by the *per capita* inspection fee for immigrants in the *Head Money Cases*, 112 U.S. 580 (1884), were limited "in any port [to] the sum received from [that port]" (*id.* at 590), and the State fees authorized by Congress under the Harbor Development and Navigation Improvement Act (*see supra* p. 23) may be imposed only to cover the costs of improvements at the particular harbor in question. 33 U.S.C. § 2236(a)(1).

Amicus Oregon argues that the United States is seeking to develop an intermodel freight transportation system (road, rail, air and water) to improve access to ports. Perhaps so, but this does not mean that individual harbors constitute an integrated whole in the sense that the nation's air system does. Moreover, under Oregon's argument, the federal government could impose a "user fee" on exports that included governmental expenses related not just to all harbors but also to rail, road, and air systems. The supposed "user fee" exception to the Export Clause would swallow the rule.

[48] And, as already noted, *Massachusetts* involved an implied immunity principle, under which the taxpayer (the State) was not protected against nondiscriminatory taxes that did not have an undue, destructive impact on State functions. 435 U.S. at 462, 466. In that context, "[t]he possibility of a slight overcharge is [not] offensive to the constitutional structure." *Id.* at 466. By comparison, the prohibitions of the Export Clause are explicit and unqualified: "A 10-cent tax or duty is in conflict with that provision as certainly as a 100-dollar tax or duty. Constitutional mandates are imperative. The question is never one of amount, but one of power." *Fairbank*, 181 U.S. at 291.

c. The Government also attacks the court of appeals for giving weight to the fact that the HMT is imposed on the exporter, at best an indirect beneficiary of harbor maintenance, rather than on the vessels that actually navigate the harbors. U.S. Br. 21-24. However, a fundamental premise of a user fee is the Government's "interest in making those who *specifically* benefit from its services pay the cost." *Massachusetts*, 435 U.S. at 462 (emphasis added). The imposition of a burden on a party who does not directly benefit from its expenditure is a hallmark of a tax. *See Commonwealth Edison Co.*, 453 U.S. at 622 ("Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied."), quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-22 (1937). The court of appeals, therefore, correctly observed that harbor maintenance directly benefits ship owners[49] and only indirectly benefits exporters.[50]

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[49] As the Senate Committee stated: "These fees and taxes [the HMT] offset services rendered to *vessels*." S. Rep. No. 126 at 7, *reprinted in* 1986 U.S.C.C.A.N. at 6644 (emphasis added).

[50] The Government contends that it does not matter whether the HMT is paid by exporters or by the carriers of export cargo because the burden created by the HMT is "allocated by economics, not by statutes." U.S. Br. 23, quoting Mayer, J., dissenting. In other words, even if vessel operators had to pay the HMT, they could simply pass the tax on to exporters. *Id.* In reality, however, it is far from certain that vessel operators could do so. In testimony before the Senate Finance Committee, a representative of numerous common carriers unequivocally stated that "there should be no illusions that carriers could pass on the cost" of the HMT. *User Fees for Ports and Waterways: Hearing Before the Senate Comm. on Finance*, 99th Cong., 1st Sess. 105 (1985) (Statement by Marc J. Fink on Behalf of 28 Ocean Common Carriers of Freight).

Moreover, if the Government were truly interested in the allocative effects of a tax, it would appreciate that a vessel-specific tax would have

d. Finally, as recognized by the court of appeals, the Government's claims of the administrative convenience of an *ad valorem* tax (U.S. Br. 27) cannot save the HMT. Pet. App. 23a. As demonstrated *supra*, Part I, the broad protection guaranteed by the Export Clause requires that any user fee exception be very narrowly drawn, and the mere contention of administrative convenience cannot make the HMT fit within those narrow parameters. *See, e.g., Pace v. Burgess*, 92 U.S. at 375 (fee must be "*necessary* in order to give to the exporter the benefit of *exemption from taxation*") (emphasis added); *cf. Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Finance*, 505 U.S. 71, 81 (1992) (State may not, under the dormant Commerce Clause, defend a discriminatory tax on grounds of administrative convenience "[a]bsent a *compelling justification*" that a legitimate state interest cannot otherwise be served) (emphasis added).

In any event, although the Government argues that any alternative to the *ad valorem* HMT would entail unreasonable administrative costs and burdens (U.S. Br. 27-28, 30), Congress plainly concluded that the alternative approach of the Harbor Development and Navigation Improvement Act of 1986 (*supra* p. 23) could readily be administered by States and localities. That Act authorizes States to "levy port or harbor dues (in the form of tonnage duties or fees) on a vessel engaged in trade entering or departing from a harbor and on cargo loaded on or unloaded from [the] vessel." 33 U.S.C. § 2236(a). The Act permits the imposition of fees only for certain projects and services, only on a project-specific basis, and only on ships of a type or size that benefitted from the improvement in question (*e.g.*, a shallow-draft vessel cannot

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the beneficial effect of encouraging the use of harbor-friendly vessels that required less harbor maintenance. An *ad valorem* tax on cargo gives neither the shipper nor the vessel owner any incentive to minimize such costs.

be charged for dredging from which it received no benefits). *Id.*[51]

The Government notes that U.S. Shoe acknowledged in its opposition to the Petition for Certiorari that Congress could have adopted a *bona fide* user fee. U.S. Br. 29-30. This does not in any way validate the approach which Congress adopted in the HMT, namely, an *ad valorem* assessment directly on exported merchandise and unrelated to the amount, if any, of federal services used by the exporter.

2. The Revenues Collected Are Substantially in Excess of the Costs of Harbor Maintenance.

In addition to the HMT not being closely (or even remotely) tied to use of harbor maintenance services, HMT revenues collected by the government are clearly excessive in relation to the federal costs of harbor maintenance. The Government states that the Harbor Maintenance Trust Fund "has provided *approximately* 100 percent" of the funds currently used for harbor maintenance (U.S. Br. 6 n.2; emphasis added) and that the fund's "current[]. . . positive balance" can be explained by year-to-year fluctuations in needs (*id.* at 17). But the record contains no evidence even suggesting that the current (and growing) fund surplus is temporary or related in any way to projected maintenance needs.

[51] It is noteworthy that although the legislative history refers to the Harbor Development and Navigation Improvement Act fees as "local user fees" (*see* S. Rep. No. 126 at 56, *reprinted in* 1986 U.S.C.C.A.N. at 6677), Congress treated even those assessments not as user fees, but rather as imposts or duties. This is evident from the fact that in 33 U.S.C. § 2236(a) (entitled "Consent of Congress"), Congress recognized the need to expressly authorize States to levy those charges under the Import-Export Clause. Because those port or harbor dues thus were treated by Congress as other than a user fee, the HMT clearly cannot be considered a user fee.

To the contrary, as the CIT found, since its inception the HMT has generated revenues far in excess of total costs, as demonstrated by the ever-growing surplus accumulated in the Trust Fund. Pet. App. 51a. The Fund surplus stood at $865 million as of fiscal year 1996 and is projected to mushroom to nearly $3 billion as of fiscal year 2001. *1995-96 Annual Report* at 7. As the CIT further noted, even as to possible future application of the Fund, the HMT "is used to fund projects yet to be commenced, *or even envisioned*, rather than to repay the government for services rendered." Pet. App. 60a (emphasis added). The Executive Branch has itself recognized the surplus to be of "continu[ing]" and "growing" concern. *1995-96 Annual Report* at 7-8. Even Judge Mayer, the sole dissenting judge below, found that the Trust Fund's large and ever-growing surplus was "troubling." Pet. App. 43a.

The *Massachusetts* Court indicated that the required relationship between an assessment and governmental costs "places a natural ceiling on the total amount that such charges may generate." 435 U.S. at 467. Plainly, the HMT, which is imposed *ad valorem* without limitation, is not subject to any "natural ceiling," as evidenced by the continually growing surplus. Furthermore, unlike *Massachusetts*, where the assessment "did not come close to recovering the costs" of the government services in question (435 U.S. at 469 n.24), the HMT has vastly exceeded federal expenditures for harbor maintenance. HMT revenues patently do not bear any relationship to the Government's harbor maintenance costs, current or projected, much less the very close relationship that should be demanded under the Export Clause.

CONCLUSION

Both courts below correctly applied this Court's precedents and properly found that the HMT on exports is a prohibited "tax or duty" under the Export Clause. The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

26 U.S.C. § 4462(f)(1)-(2) provides:

Extension of provisions of law applicable to customs duty.-

(1) In general.— Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter (and in respect of persons liable therefor) as if such tax were a customs duty. For purposes of the preceding sentence, any penalty expressed in terms of a relationship to the amount of the duty shall be treated as not less than the amount which bears a similar relationship to the value of the cargo.

(2) Jurisdiction of courts and agencies.— For purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty.

26 U.S.C. § 9505 provides:

Harbor Maintenance Trust Fund

(a) Creation of trust fund.— There is hereby established in the Treasury of the United States a trust fund to be known as the "Harbor Maintenance Trust Fund", consisting of such amounts as may be—

(1) appropriated to the Harbor Maintenance Trust Fund as provided in this section,

(2) transferred to the Harbor Maintenance Trust Fund by the Saint Lawrence Seaway Development Corporation pursuant to section 13(a) of the Act of May 13, 1954, or

(3) credited to the Harbor Maintenance Trust Fund as provided in section 9602(b).

(b) Transfer to Harbor Maintenance Trust Fund of amounts equivalent to certain taxes.— There are hereby appropriated to the Harbor Maintenance Trust Fund amounts equivalent to the taxes received in the Treasury under section 4461 (relating to harbor maintenance tax).

(c) Expenditures from Harbor Maintenance Trust Fund.— Amounts in the Harbor Maintenance Trust Fund shall be available, as provided by appropriation Acts, for making expenditures —

(1) to carry out section 210 of the Water Resources Development Act of 1986 (as in effect on the date of the enactment of the Water Resources Development Act of 1996),

(2) for payments of rebates of tolls or charges pursuant to section 13(b) of the Act of May 13, 1954 (as in effect on April 1, 1987), and

(3) for the payment of all expenses of administration incurred by the Department of the Treasury, the Army Corps of Engineers, and the Department of Commerce related to the administration of subchapter A of chapter 36 (relating to harbor maintenance tax), but not in excess of $5,000,000 for any fiscal year.

26 U.S.C. § 9602 provides:

Management of Trust Funds

* * *

(b) Investment.—

(1) **In general.**—It shall be the duty of the Secretary of the Treasury to invest such portion

of any Trust Fund established by subchapter A as is not, in his judgment, required to meet current withdrawals. Such investments may be made only in interest-bearing obligations of the United States...

33 U.S.C. § 2236(a)(1)-(4) provides:

Port or harbor dues

(a) Consent of Congress

Subject to the following conditions, a non-Federal interest may levy port or harbor dues (in the form of tonnage duties or fees) on a vessel engaged in trade entering or departing from a harbor and on cargo loaded on or unloaded from that vessel under clauses 2 and 3 of section 10, and under clause 3 of section 8, of Article 1 of the Constitution:

(1) Purposes

Port or harbor dues may be levied only in conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project) and for the following purposes and in amounts not to exceed those necessary to carry out those purposes:

(A)(i) to finance the non-Federal share of construction and operation and maintenance costs of a navigation project for a harbor under the requirements of section 2211 of this title; or

(ii) to finance the cost of construction and operation and maintenance of a navigation project for a harbor under section 2232 or 2233 of this title; and

(B) provide emergency response services in the harbor, including contingency planning, necessary personnel training, and the procurement of equipment and facilities.

(2) Limitation on port or harbor dues for emergency service

Port or harbor dues may not be levied for the purposes described in paragraph (1)(B) of this subsection after the dues cease to be levied for the purposes described in paragraph (1)(A) of this subsection.

(3) General limitations

(A) Port or harbor dues may not be levied under this section in conjunction with a deepening feature of a navigation improvement project on any vessel if that vessel, based on its design draft, could have utilized the project at mean low water before construction. In the case of project features which solely —

(i) widen channels or harbors,

(ii) create or enlarge bend easings, turning basins or anchorage areas, or provide protected areas, or

(iii) remove obstructions to navigation,

only vessels at least comparable in size to those used to justify these features may be charged under this section.

(B) In developing port or harbor dues that may be charged under this section on vessels for project features constructed under this subchapter, the non-Federal interest may consider such criteria as: elapsed time of passage, safety of passage, vessel economy of scale, under keel clearance, vessel draft, vessel squat, vessel speed, sinkage, and trim.

(C) Port or harbor dues authorized by this section shall not be imposed on —

(i) vessels owned and operated by the United States Government, a foreign country, a State, or a political subdivision of a country or State, unless engaged in commercial services;

(ii) towing vessels, vessels engaged in dredging activities, or vessels engaged in intraport movements; or

(iii) vessels with design drafts of 20 feet or less when utilizing general cargo and deep-draft navigation projects.

(4) Formulation of port or harbor dues

Port or harbor dues may be levied only on a vessel entering or departing from a harbor and its cargo on a fair and equitable basis. In formulating port and harbor dues, the non-Federal interest shall consider —

(A) the direct and indirect cost of construction, operations, and maintenance, and providing the facilities and services under paragraph (1) of this subsection;

(B) the value of those facilities and services to the vessel and cargo;

(C) the public policy or interest served; and

(D) any other pertinent factors.